PERWIRA HABIB BANK (M) BHD.

v.

TIN SIANG SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. D4-23-268-87]
1 NOVEMBER 1991

LAND LAW: *Application for an order for sale under ss. 281, 257 of the National Land Code - Lien holder's caveat - Whether there is an agreement between parties that a lien holder's caveat be enforced - Whether plaintiff entitled to lien once the title is given.*

The plaintiff sought an order for public auction of the second defendant's land so as to satisfy the judgment sum of RM3,980,311.49 together with interests and costs. The second defendant had stood as a guarantor for the loan granted to the first defendant and as security had deposited with the plaintiff the title of the said land. The first defendant defaulted the loan and consequently judgment was entered against the second defendant. As the judgment remained unsatisfied, the plaintiff made an application for sale under s. 281(2) of the National Land Code (the code for sale). The second defendant's Counsel contended that there was no agreement between the parties that a lien holder's caveat be entered. The issue was whether the plaintiff was entitled to be the holder of the lien.

Held:

[1] The Court was satisfied that the second defendant had deposited the title as security for the loan.

[2] As to the question whether the plaintiff is entitled to lien once the title was given, the Court found that the plaintiff was the holder of the lien within the meaning of s. 218(2) of the Land Code (*Palaniappa Chetty v. Dupire Brothers & Anor.*)

[Order made in terms of the argued prayers with costs.]

Case referred to:
Palaniappa Chetty v. Dupire Brothers & Anor. [1919] FMSLR 374 ***(cons)***

Legislation referred to:
National Land Code 1965, ss. 257, 257(1)(b), (c), 281, (1), (2), (3), 330

Other source referred to:
The Nature and Application of the Torren's Liens and Lien - Holders' Caveats in West Malaysia, S.Y. Kok, [1983] 1 MLJ xl @ l, li & lii

For the plaintiff - J. Doshi; M/s. Tunku Zuhri, Manan & Abdullah
For the defendant - K.V. Ng; M/s. Mun & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff for an order in terms of the following prayers:

(a) An order for sale pursuant to s. 281 and s. 257 of the National Land Code to sell all that piece of land held under Lot No. 37296 and 36430, CT No. 17775 and CT 16536 Bandar Ipoh in the State of Perak registered in the name of Haji Raun Djalil Atmosumarto (the second defendant named herein) so as to satisfy the judgment sum of

RM3,980,311.49 together with interest at the rate of 16% per annum from 16 January 1986 to the date of realisation and RM350 costs entered against the said second defendant on 3 December 1987.

(b) that the said land be sold by public auction under the supervision of this Honourable Court.

(c) that the sale be held on a specified date being a date not less than 1 month after the date on which the order is made.

(d) that the Court do fix a reserve price for the purpose of this sale.

(e) that a licensed auctioneer be appointed by this Honourable Court as the public auctioneer.

(f) that the proclamation of sale in two (2) languages namely English and Malay be approved by the Senior Assistant Registrar and be published by posting and distributing copies thereof on the Notice Board of the High Court at Kuala Lumpur fourteen (14) days before the date of sale and by insertion of a copy thereof in a local newspaper proceeding the sale.

(g) that the plaintiff be at liberty to bid at the auction and set-off the purchase price against the amount due under the judgment dated 3 December 1987.

(h) that if the sale is abortive then the matter should be adjourned to a date to be fixed by the Senior Assistant Registrar for further directions.

(i) that the costs of and incidental to this application and the said sale be paid out of the proceeds of the said sale by the said second defendant to the plaintiff.

(j) that the plaintiff do deposit in Court the said Issue Document of Title fourteen (14) days before the sale.

(k) that the plaintiff do deposit in Court a sum of RM1,000 before the auction sale.

(l) such further and/or other directions as this Honourable Court may deem just and proper.

At the hearing of the application, Miss J. Doshi, Counsel for the plaintiff said that she would be confining her arguments to prayers (a), (b), (c), (d), (g) and (l).

As security for loan facilities granted to the first defendant, the second defendant deposited with the plaintiff the issue document of title for all that land held under Lot No. 37296 and 36430 CT No. 17775 and CT 16536, Bandar Ipoh in Perak. Pursuant thereto the plaintiff executed Form 19D under s. 330 of the National Land Code. By a letter dated 16 February 1984, the Registrar of Lands in Perak confirmed that a Lien Holder's Caveat had been duly entered on 21 January 1984 pursuant to Presentation No. 492/84 Jilid 338 and Folio 55. On 3 December 1987, judgment was entered against the second defendant for the sum of RM3,980,311.49 together with interest thereon at the rate of 16% per annum from 16 January 1986 to the date of realisation and RM350 costs. The judgment remain unsatisfied.

Miss J. Doshi submitted that the plaintiff's application was made under s. 281(2) of the National Land Code. The Section states:

> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

The issue here is whether the plaintiff is entitled to be the holder of the lien. Mr. K.Y. Ng, Counsel for the second defendant contended that there was no agreement between the parties that a lien holder caveat be entered. Miss Doshi, on the other hand, submitted that the plaintiff was entitled to lien once the title was given as a security.

According to the letter of offer written by the plaintiff to the first defendant on 9 August 1983, the plaintiff granted a fixed loan facility to the first defendant up to RM3,000,000. The security for such facility included "Registered first fixed charge for RM3,000,000 million to be created by Haji Raun Djalil Atmosumarto over the bungalow at 33 Golf Club Road Ipoh". Pursuant to the terms of the said loan facility, the second defendant wrote the following letter to the plaintiff on 22 September 1983:

The Credit Manager
Perwira Habib Bank Bhd.
Jalan Sultan Ismail
Kuala Lumpur. *By Hand*

Tuan,

Re: Term Loan Facility of RM3,000,000

With reference to the above we are forwarding to you the 2 Land Titles known as

(1) C.T. 16536 Lot 36430 Town of Ipoh and

(2) C.T. 17775 Lot 37296 Town of Ipoh as the required additional security/collateral in relevance to the above.

We would like to appeal to your office not to present and register any charge on the titles but instead to keep the titles as temporary security/collateral only.

For your information, Tuan our application for conversion on Lot 830 and 923 under Geran 6533 and 4531 (77 acres) which the titles are in your possession now, is in the final stages with the Negeri Sembilan State Government. In fact the Exco (State Executive Committee) has approved the application and now we are awaiting for the approval of the minutes of the meeting as a matter of formality.

We would appreciate if you could accommodate our appeal for not presenting any charge, instead to keep the titles until the conversion of the Ampangan property is formalised, (automatically increasing the value of the property from agricultural to housing purposes).

Your kind and understanding support and co-operation has been a great help to us and will always be highly appreciated.

Thank you.

Yours sincerely
Tin Siang Sdn. Bhd.

Sgd/-
Hj. Raun Djalil Atmosumarto
Managing Director.

Acknowledge receipt of
the above documents.

Sgd.

From the above evidence, I am satisfied that the second defendant had deposited the title as security for the loan. The question is whether the plaintiff is entitled to lien once the title is given as security. In *Palaniappa Chetty v. Dupire Brs. & Anor.* [1919] FMSLR 374, Earnshaw (J), in delivering the judgment of the Court of Appeal, said at pp. 371, 376, 377 and 378 as follows:

> The security for the loan was a promissory note on which were endorsed the following words: 'As security for the repayment of the loan herein borrowed I herewith deposit my grant No. 5138 of Semenyih Mukim, Ulu Langat, Kuala Lumpur, 28 May 1918.' (Signed Ng Chin Pan in Chinese) ... Section 80 of the Registration of Titles Enactment, 1911, is as follows:
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> > 80. A lien may be created by deposit of the grant or certificate of title. The holder shall have the power at any time during the existence of his lien to enter a caveat in manner set forth in Part XII hereof to prevent all dealing with the land, and when he has obtained a judgment of the Court for the actual sum due, he shall be entitled to apply for and obtain an immediate order of sale of the land ... It follows, I think, that he has pledged the land as security for the loan, and has conferred upon the lien-holder a right analogous to that possessed by an equitable mortgagee in countries where such mortgages are recognised ... To the mind, the natural meaning of these words clearly is that an application for sale may be made subsequent to judgment. It is only reasonable that this should be so, because the application for sale is in effect merely a proceeding in execution of the judgment ...

On the question of lien under s. 281 of the National Land Code, one writer has stated:

> Section 281(1) sets down the principle of law that governs the creation of a Torrens or statutory lien. Three prerequisite elements or conditions precedent must be observed and fulfilled before a depositee is allowed to apply under Chapter 1 of Part Nineteen for the valid entry of a lien-holder's caveat. Such prerequisite elements to be complied with first of all are:
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> (a) the element of proprietorship
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> (b) the element of deposit; and
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> (c) the element of intent ...
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> Section 281(1), in very clear language, provides that only a proprietor of alienated land or a lease may deposit his respective issue document of title or duplicate lease as the case may be ...
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> The second element of deposit of title is closely connected with the last element, namely, the element of intent. A mere deposit of an issue document of title by a proprietor with any person but without an intention to borrow money from the person will not be sufficient to establish the element of deposit. Short of the intent element, any act of deposit that could be construed as a deposit done merely as a matter of convenience in view of a possible sale or simply for safe keeping due to the proprietor's departure from the country would not justify the entry of a lien-holder's caveat on the Torrens register. For instance, where the issue document of title is still in the possession of a chargee or his solicitors after a discharge of charge has been effected, the chargee's or his solicitor's continued possession of the title deed does not amount to an act of deposit to prove or support this second element by the chargee who alleges the existence of a lien in his favour ...
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> In order to establish a Torrens lien or statutory lien, the onus is on the plaintiff-depositee to prove that the deposit was made on the advance of money; he, as the financier or lender, must connect the advance with the deposit. Such holder or lender must prove the true intention of the proprietor when the title was deposited by the proprietor with him. In other words, the holder must show that the deposit was made as security for a loan advanced by the holder to the depositor-proprietor. If a deposit is for any reason other than 'as security for a loan' the act of deposit cannot be construed as being connected with a loan or advance and therefore no valid lien could, under the circumstances, be validly created under s. 281(1).

See S.Y. Kok, *The nature and application of the Torren's Liens and Lien-Holders' Caveats in West Malaysia* [1983] 1 MLJ. xl @ l, li & lii.

In my opinion the plaintiff is the holder of the lien within the meaning s. 218(2) of the National Land Code.

For the reasons stated above, I make an order in terms of prayers (a), (b), (c), (d), (g) and (l) of the application with costs.

I must add here that under s. 257(b) of the National Land Code the Court is required to fix a date for the sale of the said property by public auction. The public auction is therefore to be held on 11 May 1992. Section 257(c) requires the amount due and owing to be stated. This amount should be the sum outstanding as at the date of the order for sale. Although s. 257 refers to order for sale on a charge action but under s. 281(3), the provisions of s. 257 are applicable to an application for sale of a property on which a lien holder's caveat has been entered and that the plaintiff is to file an affidavit of outstanding amount as at 1 November 1991 to stipulate the amount outstanding.

Also found at [1992] 4 CLJ 1875